SPM MEMBRANE SWITCH SDN BHD A

v.

KERAJAAN NEGERI SELANGOR

COURT OF APPEAL, PUTRAJAYA B
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
ROHANA YUSUF J
[CIVIL APPEAL NO: B-01-757-12-2011]
12 DECEMBER 2012 C

CONTRACT: *Termination - Construction of clause - Interpretation of clauses in agreement - Notice of termination - Whether covenants fulfilled under clauses - Whether agreement terminated pursuant to clauses prescribed in agreement - Whether wrongful termination of agreement* D

CIVIL PROCEDURE: *Appeal - Appeal against judgment of High Court - Interpretation of clauses in agreement - Notice of termination - Whether covenants fulfilled under clauses - Whether agreement terminated pursuant to clauses prescribed in agreement - Whether wrongful termination of agreement - Whether trial judge erred in findings of facts - Whether there was any appealable error* E

Vide a privatisation agreement dated 27 September 2001 ('the agreement'), Kerajaan Negeri Selangor ('the respondent') had appointed SPM Membrane Switch Sdn Bhd ('the appellant') to F assist in the collection of outstanding annual quit rent in the states of Selangor. The agreement was for a period of five years with an option to extend for another two years. On 9 July 2003, the parties entered into a Supplemental Agreement ('SA') where the appellant was further tasked to issue statutory notices. Three G years into the agreement, the respondent, in exercise of its contractual right pursuant to cl. 8.1, gave the appellant 30 days notice to terminate the agreement and thereafter, issued a termination notice on 27 December 2004. In response, the appellant wrote to the respondent taking notice of the termination H and returned the CDs which contained data in accordance with cl. 8.5(a) of the agreement. Subsequently, the appellant sought the outstanding sum for services rendered prior to the termination, loss of income resulting from the termination and other consequential reliefs. The High Court Judge allowed the claim for I the outstanding due in the sum of RM2,558,541.51 but dismissed

the other part of the appellant's claim since the agreement was found to be lawfully terminated. Hence, this appeal. The appellant contended that the termination letter was a nullity for failure to cite any of the reasons for termination as enumerated under cl. 8.1. The appellant further argued that the respondent failed to adhere to cl. 9 before invoking cl. 8.1. Clause 9 gave the respondent the right to review the appellant's performance and if the performance was found to be unsatisfactory, a 30 days' notice must be given for the appellant to remedy the situation. The appellant's failure to remedy its performance would entitle the respondent to terminate the agreement pursuant to cl. 8.1(b). The appellant further argued that although the notice to terminate was issued, the reason for the termination was not stated. The appellant then proceeded to enquire the reason for the termination *vide* letter dated 20 December 2004 but the letter was not responded to by the respondent. The respondent, however, justified that the termination was due to the appellant's failure to fulfil its covenants according to the clauses provided in the agreement. Clause 6.1 required the appellant to set up, upgrade and maintain a computerised system known as "Sistem Pemantauan Cukai Tanah" ('SPCT'). Under cl. 6.2, the appellant covenanted to acquire data from the respondent to enable the preparation and service of notice of demand. Clauses 6.3 and 6.4 of the agreement as well as cl. 2 of the SA related to the issuance of the notices. The appellant was also required to provide campaign and publicity exercise under cl. 6.8. To establish their case, the appellants relied on the Laporan Audit Negara 2003 which mentioned that the appellant had created a "sistem komputer bagi tujuan kutipan tunggakan cukai tanah" and thus, had fulfilled its obligation as covenanted under cl. 6.1. The issues that arose for determination, *inter alia,* were (i) whether the agreement was rightfully terminated; and (ii) whether there was any appealable errors in the trial judge's finding of facts.

Held (dismissing appeal with costs)

Per Rohana Yusuf J delivering the judgment of the court:

(1) Clause 8.1 stipulated that the right to terminate could only be exercised upon the occurrence of any of the grounds listed therein. The grounds listed were specific and the appellant ought to choose under which of the reasons the termination was made. Although the trial judge held that there was no need for a reason to be cited, the trial judge recognised that

the right under cl. 8.1 could not be exercised arbitrarily. Therefore, it was incumbent on the respondent to inform the appellant under which sub-clause of cl. 8.1 was the agreement terminated. However, the failure to cite the reason would not nullify the termination notice because the appellant accepted the termination gracefully, without any protest and sought the outstanding sum to be paid in accordance to cl. 8.5. (paras 12-14)

(2) Although enquiries were made for the reason of termination, it was not the immediate response of the appellant but a mere afterthought. The conduct and the immediate response by the appellant revealed that the appellant had readily accepted the termination and appeared to have been aware as to why the agreement was terminated. Therefore, the failure to cite the ground of termination under cl. 8.1 was not fatal. (para 15)

(3) Clause 9 provided that a review may lead to a termination under cl. 8.1(b). Clause 8.1 was a standalone clause that gave right to the respondent to terminate upon an occurrence of any of the reasons set out. There was nothing in the two clauses to suggest that cl. 8.1 could only be invoked by the respondent upon exhaustion of cl. 9. Therefore, where written contracts were clear and unambiguous, the court should not go behind the terms of the contract to introduce a new term. (para 17)

(4) The respondent had established that the appellant failed to carry out its obligation under the agreement as well as the SA. The appellant's attempt to rely on the Laporan Audit 2003 as proof that the appellant had provided the SPCT was rather frivolous. The Laporan Audit 2003 stated that the computerised system which had been created required explanation from the auditors. An auditor's report remained as hearsay evidence unless the maker was called upon to explain its meaning. Thus, it was imprudent for the appellant to rely on the Laporan Audit 2003 to establish the fact that it had in fact set up the SPCT as covenanted under cl. 6.1 of the agreement. (paras 19, 24 & 25)

(5) There were sufficient evidence before the trial judge to justify the termination of the agreement. There was no error in the findings of the trial judge that the appellant had failed in its obligations covenanted under the cls. 6.1, 6.2, 6.3, 6.4, 6.8

of the agreement and cl. 2 of the SA. These were findings of facts which the appellate court would not readily interfere unless, *inter alia,* the findings were erroneous and was contrary to the weight of evidence. On the facts, there was no appealable error on the trial judge's finding of facts. (para 29)

Bahasa Malaysia *Translation Of Headnotes*

Melalui satu perjanjian penswastaan bertarikh 27 September 2001 ('perjanjian'), Kerajaan Negeri Selangor ('responden') telah melantik SPM Membrane Switch Sdn Bhd ('perayu') untuk membantu menuntut cukai pintu tahunan yang tertunggak di negeri Selangor. Perjanjian tersebut adalah untuk tempoh lima tahun dengan pilihan untuk melanjutkannya selama dua tahun. Pada 9 Julai 2003, kedua-dua pihak telah memasuki satu Perjanjian Tambahan ('PT') di mana perayu diberi tugasan tambahan untuk mengeluarkan notis berkanun. Selepas tiga tahun memasuki perjanjian tersebut, responden telah menggunakan hak kontraknya seperti yang diperuntukkan dalam kl. 8.1, untuk memberikan notis 30 hari kepada perayu untuk menamatkan perjanjian tersebut dan telah mengeluarkan notis penamatan pada 27 Disember 2004. Sebagai balasan, perayu telah menulis kepada responden mengambil maklum mengenai penamatan tersebut dan memulangkan cakera padat yang mengandungi data menurut kl. 8.5(a) perjanjian tersebut. Kemudian, perayu telah menuntut bayaran tertunggak bagi perkhidmatan yang diberikan sebelum penamatan, kehilangan pendapatan akibat daripada penamatan dan lain-lain relif yang berbangkit. Hakim Mahkamah Tinggi telah membenarkan tuntutan untuk bayaran tertunggak sebanyak RM2,558,541.51 tetapi menolak tuntutan lain perayu memandangkan perjanjian tersebut telah ditamatkan secara sah. Oleh itu, rayuan ini. Perayu menghujahkan bahawa surat penamatan adalah terbatal atas kegagalan menyatakan alasan bagi penamatan seperti yang termaktub dalam kl. 8.1. Perayu selanjutnya berhujah bahawa responden gagal untuk mematuhi peruntukan kl. 9 sebelum membangkitkan kl. 8.1. Klausa 9 memberikan responden hak untuk mengkaji semula prestasi perayu dan jika prestasi tersebut tidak memuaskan, notis 30 hari mesti diberikan kepada perayu untuk membetulkan prestasinya. Kegagalan perayu untuk membetulkan prestasinya akan memberi hak kepada responden untuk menamatkan perjanjian menurut kl. 8.1(b). Perayu menghujahkan bahawa walaupun notis penamatan telah dikeluarkan, alasan

penamatan gagal dinyatakan. Melalui surat bertarikh 20 Disember 2004, perayu telah menanyakan alasan penamatan tetapi surat tersebut tidak dibalas oleh responden. Responden, walau bagaimanapun, telah memberikan justifikasi bahawa penamatan tersebut adalah disebabkan oleh kegagalan perayu untuk memenuhi waad-waad berdasarkan klausa yang diperuntukkan dalam perjanjian tersebut. Klausa 6.1 memerlukan perayu untuk menubuhkan, menaik taraf dan menyenggara sistem berkomputer yang dikenali sebagai Sistem Pemantauan Cukai Tanah ('SPCT'). Di bawah kl. 6.2, perayu berwaad untuk mendapatkan data daripada responden untuk membolehkan penyediaan dan penyampaian notis tuntutan. Klausa-klausa 6.3, 6.4 perjanjian tersebut dan juga kl. 2 PT adalah berkaitan dengan pengeluaran notis. Perayu juga dikehendaki menyediakan kempen-kempen dan publisiti di bawah kl. 6.8. Untuk membuktikan kes mereka, perayu-perayu bergantung kepada Laporan Audit Negara 2003 yang menyatakan bahawa perayu telah mencipta "sistem komputer bagi tujuan kutipan tunggakan cukai tanah", dan oleh itu, kewajipanya telah dilaksanakan di bawah kl. 6.1. Isu-isu yang dibangkitkan untuk pertimbangan, antara lain, adalah (i) sama ada perjanjian tersebut ditamatkan dengan sah; dan (ii) sama ada terdapat kekhilafan yang boleh dirayu terhadap penemuan fakta hakim bicara.

Diputuskan (menolak rayuan dengan kos)
Oleh Rohana Yusuf H menyampaikan penghakiman mahkamah:

(1) Klausa 8.1 memperuntukkan bahawa hak penamatan hanya boleh dilaksanakan apabila mana-mana alasan yang disenarai di dalamnya berlaku. Alasan-alasan yang disenaraikan adalah khusus dan perayu sepatutnya memilih atas alasan mana penamatan tersebut dibuat. Walaupun hakim bicara memutuskan bahawa tidak ada keperluan untuk menyatakan alasan, hakim bicara telah mengiktiraf bahawa hak di bawah kl. 8.1 tidak boleh digunakan sewenang-wenangnya. Oleh itu, adalah penting bagi responden untuk memaklumkan kepada perayu di bawah sub kl. 8.1 yang manakah perjanjian tersebut ditamatkan. Walau bagaimanapun, kegagalan untuk menyatakan alasan penamatan tidak akan membatalkan notis penamatan tersebut kerana perayu telah menerima penamatan tersebut dengan rela hati, tanpa sebarang bantahan dan telah menuntut bayaran tertunggak berdasarkan kl. 8.5.

(2) Walaupun pertanyaan telah dibuat untuk sebab penamatan, ia bukanlah tindak balas serta-merta oleh perayu tetapi suatu fikiran terkemudian semata-mata. Kelakuan dan tindak balas serta-merta perayu mendedahkan bahawa perayu telah memerima penamatan tersebut dan menyedari sebab perjanjian tersebut ditamatkan. Oleh itu, kegagalan untuk menyatakan alasan penamatan di bawah kl. 8.1 tidak menjejaskan.

(3) Klausa 9 memperuntukkan bahawa suatu kajian semula boleh menjurus kepada penamatan di bawah kl. 8.1(b). Klausa 8.1 adalah satu klausa tersendiri yang memberikan hak kepada responden untuk menamatkan perjanjian apabila berlakunya mana-mana alasan yang dinyatakan. Tiada apa-apa dalam kedua-dua klausa tersebut yang mencadangkan bahawa kl. 8.1 hanya boleh dibangkitkan oleh responden selepas kl. 9 digunakan. Oleh itu, di mana kontrak bertulis adalah jelas tanpa sebarang kekaburan, mahkamah tidak boleh mentafsir kontrak untuk memperkenalkan terma yang baru.

(4) Pihak responden telah membuktikan bahawa perayu telah gagal untuk menjalankan obligasinya di bawah perjanjian tersebut dan juga PT. Cubaan perayu untuk bergantung kepada Laporan Audit 2003 sebagai bukti bahawa perayu telah menyediakan SPCT adalah remeh. Laporan Audit 2003 menyatakan bahawa sistem berkomputer yang telah diwujudkan memerlukan penjelasan juru audit. Laporan juru audit kekal sebagai keterangan dengar cakap kecuali jika pembuatnya dipanggil untuk menjelaskan maksudnya. Maka, ia adalah tidak berhemat untuk perayu bergantung kepada Laporan Audit 2003 bagi membuktikan fakta bahawa SPCT telah ditubuhkan seperti yang diwaadkan di bawah kl. 6.1 perjanjian tersebut.

(5) Terdapat bukti yang mencukupi di hadapan hakim bicara untuk menjustifikasikan penamatan perjanjian tersebut. Tidak ada kekhilafan dalam dapatan hakim bicara bahawa perayu telah gagal dalam tanggungjawabnya seperti yang diwaadkan di bawah klausa-klausa 6.1, 6.2, 6.3, 6.4, 6.8 perjanjian tersebut dan kl. 2 PT. Ini adalah dapatan fakta di mana mahkamah rayuan tidak akan mengganggu dengan mudah kecuali, antara lain, jika dapatan tersebut adalah salah dan bertentangan dengan beban keterangan. Berdasarkan fakta, tidak ada kekhilafan yang boleh dirayu dalam dapatan fakta hakim bicara.

Case(s) referred to:
Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Anor [1989] 1 LNS 194 SC ***(refd)***
Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd [2005] 3 CLJ 238 CA ***(refd)***
NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***

Legislation referred to:
National Land Code, s. 97

For the appellant - Hazman Ahmad (Nur Aziatul Nadia Roslan with him); M/s Omar Ismail Hazman & Co
For the respondent - Md Azhari Abu Hanit; State Legal Advisor, Selangor

[Appeal from High Court, Kuala Lumpur; Civil Suit No: MT4-21-129-2005]

Reported by Sandra Gabriel

JUDGMENT

Rohana Yusuf J:

[1] Kerajaan Negeri Selangor (defendant/respondent) *vide* a privatisation agreement dated 27 September 2001 (the agreement) appointed SPM Membrane Switch Sdn Bhd (plaintiff/appellant) to assist in the collection of outstanding annual quit rent in the districts of Petaling, Kuala Langat, Hulu Langat, Sepang and Hulu Selangor in the state of Selangor.

[2] The agreement was for a period of five years with an option to extend for another two years subject to conditions. The covenants of the appellant were listed in cls. 6.1 to 6.9 of the agreement which *inter alia* includes; the setting up of a computerised system, acquiring and processing of data, preparation of notice of demand, service of the notice, submission of forfeiture list, public campaign and advertisement, and return of data in relation to collection of quit rent. On 9 July 2003 parties entered into a supplemental agreement where the appellant was tasked with further duty to issue statutory notices pursuant to s. 97 of the National Land Code (NLC).

[3] The respondent meanwhile issued Pekeliling Setiausaha Kerajaan Negeri Selangor (Seksyen Penswastaan dan Ekonomi) PTD: SPEN BIL.1/2002 dated 20 June 2002 to all Pentadbir Tanah Daerah (PTD) outlining the implementation of the privatisation of the quit rent collection to all the land offices.

[4] Three years into the agreement, the respondent in exercise of its contractual rights pursuant to cl. 8.1, *vide* a letter dated 22 November 2004 gave 30 days notice to terminate the agreement. Thereafter on 27 December 2004 a termination notice was issued.

[5] In response to that termination notice, the appellant on 6 December 2004 wrote to say it took note of the termination notice, returned the CDs containing data in accordance with cl. 8.5(a) of the agreement and sought for outstanding to be paid. The respondent failed to pay and the appellant pursued the claim in the High Court.

[6] In its claim the appellant sought for the outstanding due for services rendered prior to termination, loss of income resulting from the termination and other consequential reliefs. The learned High Court Judge allowed the claim for the outstanding due in the sum of RM2,558,541.51 together with 4% judgment interest from the date of judgment to realisation. The other part of the appellant's claim was dismissed and hence this appeal.

[7] The learned judge dismissed the other part of the claim because she found the agreement was lawfully terminated in accordance with the terms of the agreement. The learned judge held that the termination was justified under cl. 8.1(b), as she found the appellant was in breach of its covenants under cls. 6.1, 6.2, 6.8 of the agreement as well as cl. 2 of the supplementary agreement. Accordingly, upon termination, the appellant could only claim to be paid for the outstanding due for services it provided before the termination as provided under cl. 8.5.

[8] The appellant's ground of appeal can be summed as follows. That the learned judge had fallen into error; in her finding that the termination was lawful; cl. 8.1 required no reason be cited to terminate the agreement; in construing that there is no necessity to invoke cl. 9 before invoking cl. 8.1; in her finding that the

appellant had not fulfilled its covenants and in rejecting the report in Laporan Audit 2003 as evidence of the appellant's covenant to set up the computerised system.

Whether Termination Was Unlawful

[9] The letter of termination was submitted to be a nullity for two reasons; first, it failed to cite any of the reasons enumerated under cl. 8.1 to terminate the agreement. Secondly, the respondent did not follow procedures set out in cl. 9 before invoking cl. 8.1. These two failures were submitted to render the termination invalid for non-compliance with the terms of the agreement.

[10] We have examined the relevant clauses of the agreement. We note that in her judgment the learned judge had deliberated at length on the entrenched principle of interpretation of a written agreement. The learned judge held that no reason needed to be cited in the termination notice issued under cl. 8.1 because the clause is silent on such requirement. Consequently the learned judge held that the failure of the respondent to cite any reason in the termination was not a breach of cl. 8.1.

[11] We find merit in the argument by the appellant that cl. 8.1 necessitates a reason to be cited. It is pertinent to note that cl. 8.1 listed out eight different reasons and circumstances under which the respondent can terminate the agreement. Clause 8.1 is reproduced below for better appreciation of its effect:

Clause 8 Termination

8.1 The State Government shall be entitled to terminate this agreement by giving thirty (30) days notice to the Company if:

(a) the equity structure and/or the structure of the board of directors of the Company is modified without the State Government's written consent within one (1) year of the date of this agreement;

(b) the Company is unable to perform its Services as provided under the Agreement;

(c) the company shall cease to or threatened to cease to carry out its operation or if in the opinion of the State Government, the Company is not carrying on its operation with sound financial and commercial standards;

A (d) if a receiver and/or Manager shall be appointed in respect;

(e) a petition shall be presented or any order be made or a resolution be passed for the winding-up of the Company of if the Company enters into liquidation whether voluntarily or compulsorily;

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(f) at the time it becomes unlawful for the Company to perform its obligations under this Agreement;

(g) legal proceedings of any kind be instituted against the Company;

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(h) any judgment is obtained against the Company."

[12] From the above it is clearly stipulated that the right to terminate can only be exercised upon the occurrence of any of the grounds listed in (a) to (h). The grounds listed are specific and the appellant ought to choose under which of the reasons the termination was made. The learned judge despite her finding that reason need not be cited recognised that the right under cl. 8.1 cannot be exercised arbitrarily. In our view it is because the right cannot be arbitrarily exercised that the respondent is obliged to inform the appellant under which particular sub-clause of cl. 8.1 was the agreement terminated. We do not agree with the learned judge that just because cl. 8.1 does not specifically require a reason to be given the respondent need not do so. In our view when there are eight different reasons for the respondent to act upon, it is incumbent upon the respondent to notify under which of the reasons it terminated the agreement.

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[13] Nevertheless, on the facts of this case we find the failure to cite reason would not nullify the termination notice. We say so for the following reasons. The learned judge found the conduct of the appellant after receiving the termination was quite revealing. In her grounds of judgment, the learned judge found that the appellant accepted the termination gracefully. In her own words, the learned judge said "... kelihatan plaintiff telah menerima notis penamatan perjanjian tersebut dengan baik." The learned judge was referring to a written response by the appellant which was made two weeks after receiving the termination notice of 22 November 2004. It would be necessary to produce the letter *in extenso* to appreciate

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the observation made by the learned judge on the reaction of the appellant upon being notified that the agreement would be terminated within 30 days.

SPM Membrane Switch Sdn Bhd
307 Block A, Kelana Business Centre
97 Jalan SS7/2, Kelana Janaya, 47301
Selangor Darul Ehsan

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Y.B. Dato' Ramlan bin Othman
Setiausaha Kerajaan Negeri Selangor,
Tingkat 19, Bangunan SSAAS,
40503 Shah Alam,
Selangor.

06hb Disember 2004

Y.B. Dato',

Notis Penamatan Perjanjian Penswastaan Kutipan Tunggakan Cukai Tanah Negeri Selangor Bertarikh 27 September 2001 Dan Perjanjian Tambahan Bertarikh 9 Julai 2003 Antara Kerajaan Negeri Selangor Dan SPM Membrane Switch Sdn Bhd

Surat Y.B. Dato' bertarikh 22 Nov., 2004 berkaitan dengan perkara di atas adalah dirujuk.

2. Terlebih dahulu saya dan pengurusan syarikat ini mengucapkan ribuan terima kasih kepada Kerajaan Negeri Selangor yang telah memberi kepercayaan kepada syarikat ini untuk menjalankan kerja-kerja kutipan tunggakan cukai tanah. Kerjasama yang telah diberikan oleh pegawai dan kakitangan Kerajaan Negeri sejak tahun 2001 telah berjaya meningkatkan kutipan tunggakan cukai tanah.

3. Notis penamatan perjanjian telah diambil maklum oleh syarikat ini. Bersama-sama ini disertakan CD-CD yang mengandungi data yang berkaitan dengan tunggakan dan kutipan cukai tanah seperti mana dikehendaki oleh klausa 8.5 (a). Sementara itu, klausa 8.5 (b) ini juga menetapkan bahawa Kerajaan Negeri bertanggungjawab untuk membuat pembayaran yang telah dikemukakan dalam masa 30 hari dan dengan secepat mungkin ke atas invois-invois yang akan dikemukakan.

4. Berdasarkan kepada ketetapan di atas, pihak kami amat berbesar hati jika sekiranya Y.B. Dato' dapat memberi pertimbangan yang saksama ke atas:

(i) Pembayaran ke atas invois-invois yang telah dikemukakan dalam masa 30 hari dari tarikh notis penamatan seperti mana termaktub mengikut para klausa 8.5(b). Perincian invois-invois yang telah dikemukakan seperti lampiran.

(ii) Meminta kerjasama Pusat Teknologi Maklumat dan Komunikasi Negeri Selangor (ICT, Selangor) membekalkan kepada syarikat ini data kutipan bayaran bagi tempoh Jan, 04 hingga kini supaya invois bayaran dapat dikemukakan. Untuk makluman Y.B. Dato' data kutipan ini telah pun dipohon oleh kami sejak 6 Sept. 04 lagi.

Sekian, terima kasih. Wassalam.

SPM Membarane Switch Sdn Bhd

t.t.

...
Abu Hassan Hj Hashim
Pengerusi Eksekutif

s.k. (1) Seksyen Penswastaan
Unit Perancang Ekonomi Negeri Selangor

(2) Y.B. Dato' Pegawai Kewangan Negeri Selangor

[14] The above letter is a contemporaneous document sent very soon after the termination notice was received. We agree with the learned judge that the intonation of the letter shows that the appellant had accepted the termination without any protest. It does not reflect a reaction of someone who was caught by surprise or was not aware of why the agreement was terminated in the first place. Indeed, the appellant had accepted the termination and proceeded to seek for the outstanding sum to be paid in accordance with cl. 8.5.

[15] Despite issuing the above letter, the appellant took a position that it was not aware of the reason for termination. To support its position the appellant's pleaded case was that, after receiving the notice to terminate, it proceeded to enquire for the reason *vide* a letter dated 20 December 2004 (see para. 15 pernyataan tuntutan). The appellant claimed this letter was not responded to by the respondent. We have perused through the appeal records and we do not find such letter and nor was it referred to by the learned judge in her grounds of judgment. In our view, even if it

is true that such enquiries were made, it was not the immediate response of the appellant. It was an afterthought having accepted the termination without any complaint. On evidence, we agree with the learned judge that the conduct and the immediate response by the appellant revealed that the appellant had readily accepted the termination and appeared to have been aware why the agreement was terminated. For this reason and on the facts of this case, in our judgment, the failure to cite the ground of termination by the respondent under cl. 8.1 is not fatal to its case.

[16] We now come to the second argument of the appellant in relation to cl. 8.1. The appellant submitted that cl. 8.1 cannot be invoked without adhering to the steps required under cl. 9. Clause 9 provides for procedures to be taken during the contract period giving right to the respondent to review the performance of the appellant in the provision of its services under the agreement. To do that, the parties will have to first set out the agreed terms and conditions between them. If after reviewing, the respondent found the performance of the appellant unsatisfactory, it must give 30 days' notice for the respondent to remedy the unsatisfactory situation. Failure to remedy would entitle the respondent to terminate the agreement pursuant to cl. 8.1(b).

[17] A review under cl. 9 may finally lead to a termination under cl. 8.1 (b) but it is not a requirement under cl. 8.1 that it can only be invoked after exhausting cl. 9. Clause 8.1 is a standalone clause giving right to the respondent to terminate upon an occurrence of any of the events or reasons sets out thereunder. There is nothing in these two clauses to suggest that cl. 8.1 can only be invoked by the respondent upon exhaustion of cl. 9. We therefore agree with the learned judge in her construction and the application of cl. 9 and her reliance on the decision of this court in *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 3 MLJ 38 as well as the decision of the Supreme Court in *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Anor* [1989] 1 LNS 194; [1986] 3 MLJ 164. The Supreme Court in *Koh Siak Poo* held that where written contracts are clear and unambiguous the court should not go behind the terms of the contract to introduce any new term. (see also *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd* [2005] 3 CLJ 238; [2005] 5 MLJ 1). The argument by the appellant to subject cl. 8.1 to cl. 9 would defy this established rule of interpretation.

Reasons For Termination

[18] As we have alluded to earlier, the learned judge despite finding that no reason needed to be cited in the termination letter, acknowledged that there cannot be an arbitrary termination of the agreement. The learned judge then went on to determine and deliberated on the reasons pleaded by the respondent as to why the agreement was terminated. In its defence, the respondent justified the termination on the appellant's failure to fulfil its covenants under the agreement.

[19] Having gone through the evidence before her, the learned judge found that the respondent had established on evidence that the appellant had failed to carry out its obligations under cls. 6.1, 6.2, 6.3, 6.4 and 6.8 of the agreement as well as cl. 2 of the supplementary agreement.

[20] Under cl. 6.1, the appellant is obliged to set up, upgrade and maintain a computerised system known as Sistem Pemantauan Cukai Tanah (SPCT) for the respondent. SP1 testified and explained the various steps needed to be done in the setting up of the SPCT. SP4 explained at length the process of converting raw data etc to set up SPCT. Despite all the explanation the learned judge found that at the end of the trial the appellant failed to prove that it had established SPCT as covenanted under cl. 6.1.

[21] On the other hand, the respondent had established in evidence on the failure of the appellant to meet its obligation under cls. 6.1 and 6.2 to set up the SPCT or upgrade the computerised system as covenanted by it. The learned judge relied on the evidence of SD8. The learned judge found the evidence of SD8 reliable, consistent and clear on the point. SD8 was the officer responsible to supply raw datas relating to information required by the appellant to enable the setting up of the computerised system. He testified that he had supplied the raw datas in the form of "text file" which the appellant should convert into Microsoft Access, Notepad, Microsoft Access or MySQL. The system to be provided by the appellant would have to undergo system testing such as User Acceptance Testing and Final Acceptance Testing which would be approved by the user ie, the respective land offices. The PTG would have to be trained on the use of the respective system to ensure a Process Workflow is

achieved. SD8 further explained that Microsoft Excel and Notepad are enabler tools which enable data from text file to be converted. Whilst the computerised systems are like the Human Resource Management System, Queue Management System, Case Management System as well as Sistem Pendaftaran Tanah Berkomputer (SPTB) are some of the systems to be provided by the appellant under the agreement.

[22] SD8 confirmed that the appellant had never held any discussion, meeting or consultation with him towards setting up the SPCT. Throughout his tenure of office in the ICT Centre of the respondent, the appellant had never sought his advice, consulted him or came to the centre to make any enquiry about setting up the system. There were other evidence by the PTG (ADO Hasil) and SD4 relating to the computer system. The testimonies of the respondent witnesses SD3, SD5, SD6, and SD7 whose duties include supervising the collection of outstanding quit rent, voiced their dissatisfaction with the services provided under the agreement and confirmed that no SPCT was set up by the appellant.

[23] In this regard, the learned judge rejected the reason given by the appellant for its failure was due to the fact that it cannot access the respondent's system.

[24] The respondent sought to rely on the Laporan Audit Negara 2003 which mentioned that the appellant had created "sistem komputer bagi tujuan kutipan tunggakan cukai tanah" to establish its case that it had fulfilled its obligation on the same. The learned judge had carefully appraised the evidence of the appellant's own witness SP4 who confirmed that at the end of the day the appellant had not set up SPTC. The learned judge noted the various discrepancies in the Laporan Audit 2003 on this matter. Having carefully analysed the evidence before her, the learned judge agreed with the opinion expressed by SD9. SD9 confirmed the testimonies of SD6 that the auditors in the preparation of Laporan Audit may not appreciate the real meaning of the computerised system on SPCT envisaged under the agreement.

[25] In our view, the learned judge was right when she did not accept the Laporan Audit 2003 as proof that the appellant had provided the SPCT. The attempt by the appellant to rely on the Laporan Audit to prove its case was rather frivolous. The Laporan

Audit which states that "sistem komputer bagi tujuan kutipan tunggakan cukai tanah" had been created requires explanation of the auditors. An auditor's report remains as hearsay evidence unless the maker is called upon to explain its meaning. Thus it is imprudent for the appellant to rely on it, to establish the fact that it has in fact set up the SPCT covenanted under cl. 6.1 of the agreement.

[26] Under cl. 6.2 the appellant covenanted to acquire data from the respondent and cause to cleanse, verify and update the data to determine quit rent arrears to enable the preparation and service of notice of demand. Clauses 6.3 and 6.4 relate to the issuance of the notices. SP2 admitted that the appellant did not fulfil these covenants on the ground that it was not obliged to do so.

[27] The appellant was to provide campaign and publicity exercise as covenanted under cl. 6.8. The learned judge agreed that there were some campaign and publicity exercise conducted by the appellant but the appellant failed to provide scroll advertising directed by the respondent, brochures and flyers at shopping complexes in Selangor, failed to contribute for billboard advertisement and the appellant failed to report the development to Bahagian Pengurusan Hartanah (BPH). The learned judge rejected the reason put forth by the appellant that the appellant's failure was because the appellant was never called for discussion on the type of advertisement to be put up. This is evidenced from a letter dated 8 April 2004 issued by the respondent stating the lack of co-operation from the appellant with regards to publicity and advertisement. This letter was not responded nor denied by the appellant.

[28] On the other failures of the appellant such as issuance and service of notice under cl. 2 of the supplementary agreement, the learned judge had rightly relied on the admission of the appellant's witnesses. The appellant admitted that it did not issue Borang 6A and Borang 8A as required under cl. 2 of the supplementary agreement.

[29] In our judgment, on the facts of the case, there were sufficient evidence before the learned judge to justify termination of the agreement by the respondent. We do not find error in her findings in that the appellant had failed in its obligations

covenanted under cls. 6.1, 6.2, 6.3, 6.4, 6.8 of the agreement as well as cl. 2 of the supplementary agreement. We are mindful that these are findings of facts which the appellate court would not readily interfere unless the finding is erroneous and is contrary to the weight of evidence or where there is failure of judicial appreciation of facts or law or that the error is so manifest that it had caused injustice to the appellant which warrant appellate intervention. We do not find any appealable error on her findings of these facts.

[30] Lastly, the appellant raised the issues on the application of cl. 8.1 (b), which the learned judge found to be the correct clause to justify termination by the respondent on the appellant's breaches of its covenants. The appellant submitted that under cl. 8.1 (b), the agreement can only be terminated if the "company is unable to perform its services as provided under the agreement." Not fulfilling the above covenants according to the appellant is a "failure" and not a case of "unable". In our view this argument borders on semantics. Whether the appellant was unable or failed to perform the required obligations, it would all lead to the same result, that the appellant was in breach of its covenants under the agreement.

[31] On all the above reasons, we accordingly dismissed the appeal. We affirmed the decision of the High Court and awarded costs of RM20,000 to the respondent.